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COURT OF APPEALS
DIVISION TWO

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0382-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JOSE ALFREDO PERALTA,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20010421

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF GRANTED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Garcia Law Firm, PLC
By Bernardo M. Garcia

Tucson
Attorneys for Petitioner

H O W A R D, Presiding Judge.

¶1 Petitioner Jose Peralta seeks review of the trial court’s denial, without an evidentiary hearing, of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., claiming ineffective assistance of counsel. The state concedes the trial court erred in summarily denying Peralta’s petition. For the reasons set forth below, we accept the state’s concession of error, grant relief, and remand this case for further proceedings consistent with this decision.

¶2 Whether a post-conviction claim warrants an evidentiary hearing “is, to some extent, a discretionary decision for the trial court.” *State v. D’Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1998). We therefore review a court’s decision to deny an evidentiary hearing for an abuse of discretion. *See State v. Sanchez*, 200 Ariz. 163, ¶ 10, 24 P.3d 610, 613 (App. 2001). A defendant is “entitled to an evidentiary hearing only when he presents a colorable claim” for post-conviction relief, “one that, if the allegations are true, might have changed the outcome.” *State v. Runnigeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); *see also State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006).

¶3 If the trial court determines, however, that the defendant’s claim does not present a “material issue of fact or law . . . which would entitle [the defendant] to relief,” the court may summarily dismiss the claim without an evidentiary hearing. *State v.*

Andersen, 177 Ariz. 381, 385, 868 P.2d 964, 968 (App. 1993), *quoting* Ariz. R. Crim. P. 32.6(c). In determining if a defendant is entitled to an evidentiary hearing, the court must be mindful that, “when doubt exists, ‘a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review.’” *D’Ambrosio*, 156 Ariz. at 73, 750 P.2d at 16, *quoting State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶4 Peralta averred his trial counsel was deficient in advising “him to abscond and allow trial to proceed in absentia.”¹ He argues his counsel’s advice prejudiced him because it resulted in a waiver of his right to testify.

¶5 In its ruling on Peralta’s petition for post-conviction relief, the trial court determined that “overwhelming evidence in the record” showed Peralta’s trial “counsel did not, in fact, advise [him] to abscond from trial” and counsel’s performance was therefore “not deficient.” Because the court concluded counsel’s performance was “not deficient,” it declined to address whether, if counsel had indeed advised Peralta to abscond, such advice would have prejudiced Peralta.

¶6 The question whether Peralta’s attorney advised him to abscond is a material issue of fact. *See* Ariz. R. Crim. P. 32.6(c); *Andersen*, 177 Ariz. at 385, 868 P.2d at 968. And assuming, without deciding, that Peralta’s allegations that counsel advised him to

¹Peralta also mentions other potential instances of ineffective assistance of counsel but fails to adequately develop any argument concerning them in his petition for review. Therefore, the issues are waived. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) through (iv); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

abscond are true, *see Runningeagle*, 176 Ariz. at 63, 859 P.2d at 173, we conclude that he has alleged part of a colorable claim of ineffective assistance of counsel—namely, deficient performance of trial counsel. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *State v. Hershberger*, 180 Ariz. 495, 497, 885 P.2d 183, 185 (App. 1994) (“[W]hen a defendant claims, under oath, that his lawyer told him to lie for the sole purpose of establishing a factual basis for the plea, the defendant is entitled to an evidentiary hearing to determine whether such is true.”).

¶7 We recognize, however, that a claim for post-conviction relief may be so patently frivolous that no evidentiary hearing is required on the claim. As this court has observed, the trial court may dismiss a petition if “it finds from the pleadings and record that all of the petitioner’s claims are frivolous and that it would not be beneficial to continue the proceedings.” *State v. Lemieux*, 137 Ariz. 143, 147, 669 P.2d 121, 125 (App. 1983), *quoting* Ariz. R. Crim. P. 32.6(c) cmt.; *see also State v. Boldrey*, 176 Ariz. 378, 380, 861 P.2d 663, 665 (App. 1993) (“To be colorable, the claim must have the appearance of validity.”). And we agree with the trial court that significant evidence undermines Peralta’s claim. But the court did not label Peralta’s claim frivolous; it made a factual finding that trial counsel did not advise Peralta to abscond. Additionally, the state has conceded error.

¶8 Accordingly, we grant relief and remand this case to the trial court for further proceedings consistent with this decision. Because the trial court did not previously address

Peralta's claim of prejudice, it may do so now. If the court determines that Peralta has also raised a colorable claim of prejudice, Peralta is entitled to an evidentiary hearing.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge